The Rights of African Women:

some suggested Reforms

compiled by

Muriel Horrell

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S.A. Institute of Race Relations

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MURIEL HORRELL

Research Officer

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S. A. Institute of Race Relations

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The proposals made for reforms in the legal status of African women are made by the writer, and do not necessarily express the views of the S.A. Institute of Race Relations.

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THE RIGHTS OF AFRICAN WOMEN

Some Suggested Reforms

Whether they live in tribal areas or in towns, Africans have irreversibly become absorbed into the Western exchange economy. Women, who under archaic tribal law were always subject to a man's guardianship, have in many cases become wage-earners and often contribute to the support of their families or maintain themselves and their children by their own efforts. Traditional tribal attitudes to women are changing.

Left to themselves, African courts of law would no doubt have adjusted themselves to developing attitudes and circumstances, as they are doing in other parts of the continent. But in South Africa, white administrators and judicial officers have institutionalised native law, thus preventing flexibility. The subordinant position of women has been maintained in many aspects of life, to their material disadvantage. Inequitable and distressing situations arise. The stereotype applied in courts of law may operate against women more harshly than tribal law did.

Uncertainties arise because of conflicting provisions of native law and the common law, and in numbers of respects the exact legal status of an African woman may be in doubt. Clarification is needed. Furthermore, there are various differences between provincial ordinances and regulations which would appear to be unwarranted.

In this memorandum attention is drawn to some of the legal disabilities of African women, and suggestions are made for certain modernisations of the law and of court practice.

LEGAL CAPACITY OF WOMEN

PROPOSITION: That the common law rule of legal capacity should be extended to all women without discrimination.

Under the common law, men and women who are sane, solvent and over 21 years of age (other than married women who are subject to their husbands' marital power) have full legal capacity.

(The position of married women who are subject to their husbands' marital power under the common law, and of customary union wives under native law, is dealt with later.)

While tribal law catered for an extensive series of obligations, most of which arose automatically in the course of traditional African life, it knew of no law of contract in the sense in which we understand an individually contracted commercial agreement. The family, rather than an individual, had full legal capacity. The man as senior partner in a marriage, managed the joint estate, but each sex had its defined position and sphere of activity.

As Africans became absorbed into the exchange economy some modification of tribal law was obviously necessary, and the different provinces introduced varying legislation on the subject. Eventually, in 1943, subsection 11(3) was added to the Native Administration Act, No. 38 of 1927 as amended.

This states that 'the capacity of a Bantu to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Bantu, be determined as if he were a European'. There are two provisos: (a) is to the effect that a Bantu's capacity in relation to any matter affecting rights held by him or obligations resting upon him shall be determined according to native law if the existence of such right or obligation derives from native law. Proviso (b), dealing with women who are partners in customary union, is referred to later.

The effect of this sub-Section is that (unless any statutory provision otherwise provides) the legal capacity of African women is governed by the common law. In Natal there are such statutory provisions, contained in the Natal Code of Bantu Law, recently re-published with amendments as Proclamation R195 of 1967.

Elsewhere than in Natal, then, African women have full capacity under the common law if they are unmarried and over 21 years of age, or widows, or divorcees, or if they are married by Christian or civil rites and their husbands' marital power has been excluded.

Tribal law regulates capacity only in proceedings that arise out of rights or obligations founded in such law, thus does not operate in regard to such matters as private ownership of property, claims for damages under the common law, etc.

Under the Natal Code, however, the ancient disabilities of women have been maintained and, probably, rendered more severe. There was some flexibility under tribal law. Women of different tribes had varying rights over property that they acquired by gift or by their own efforts. In modern times it has become increasingly possible for women to acquire property. If left to themselves, African courts would probably have adjusted tribal law to the new circumstances, as they are doing in other parts of the continent. But white judicial officers have devised a stereotype, drawing a sharp distinction between 'majors' and 'minors' where in many cases this did not exist.

Section 27(2) of the Natal Code states that, unless she has

been emancipated, 'a Bantu female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code.' She is always under the guardianship of a man. In terms of Sections 44 and 45 of the Code, a woman is first under the guardianship of her father, or, if he should die or become incapacitated, the head of the kraal concerned. When she marries, her husband is her guardian; and if she becomes divorced the guardianship reverts to her father or the head of his kraal. If she becomes widowed, the guardian is the head of her husband's kraal (who may be her eldest son if he is a major in law) (Section 27 (1)).

Section 31(1) of the Bantu Administration Act empowers the State President to grant to any Bantu a letter of exemption exempting the recipient from native law and custom. Such exemptions are rarely now granted, and a woman's prospects of gaining relief in this way are remote.

Section 28 of the Natal Code, however, provides that any unmarried woman, widow, or divorcee who is the owner of immovable property or who by virtue of good character, education, thrifty habits, or any other good and sufficient reason is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of the Bantu Affairs Commissioner's court and vested with the full powers of a kraal head or with full rights of ownership in respect of any property she may have acquired and with full power to contract or to sue or be sued in her own name. She may be given control over the property of her minor children.

Application for emancipation must be upon affidavit and motion to the Bantu Affairs Commissioner's court. Notice must be served to the applicant's guardian.

Even if she has not been emancipated, a woman in Natal has legal capacity in common law transactions, as conferred by Section 11(3) of the Bantu Administration Act. A spinster, widow or divorcee can, thus, take out an insurance policy or acquire immovable property in her own name. But if the proceeds of the property are regarded as 'earnings' they vest in her father or kraal head and can be attached for his debts. He is, similarly, entitled to her wages, salary, or other movable property she acquires. The woman has, in return, the right to be maintained by her guardian but this protection may often not be offered or not be available.

A married woman in Natal cannot be emancipated, even if she has been deserted by her husband and is unsupported by him.

It is suggested that the common law rule of legal capacity should be extended to all women, without discrimination. This would do no more than acknowledge what is already the position in three provinces, and would remove the unwarranted discrimination suffered by those in Natal. Amendments to the Natal Code would be required.

MARRIAGE UNDER THE COMMON LAW

PROPOSITION: That Section 2 of the Bantu Laws Amendment Act, No. 23 of 1972, be repealed.

The Marriage Act of 1961 is of general application except that Section 39(4) and (5) provides that then existing laws which governed the marriages of non-white persons only will remain in force unless the State President declares by proclamation that they shall cease to apply.

There were no such laws in the Cape and Free State, hence marriages of Africans by Christian or civil rites take place under the same conditions as in the case of other sections of the community. The consent of a woman's guardian is necessary only when she is under 21 years of age. (The subject of ante-nuptial contracts is dealt with later.)

There were special laws governing African marriages in Natal and the Transvaal, however, which remained in force until the Bantu Laws Amendment Act, No. 23 of 1972, was passed.

This Act provided that, in Natal and the Transvaal, a marriage officer shall not solemnise a marriage to which an African woman *who is of age* is a party, unless the written consent of her father or legal guardian is produced.

If, after a proper enquiry, the Minister or any person authorised thereto by him is satisfied that the woman has no father or guardian, or that her father or guardian unreasonably withholds his consent, or that for any other good reason she is unable to obtain such consent, the necessary consent, in writing, may be given by the Minister or other authorised person.

Alternatively, the woman may apply to a judge of the Supreme Court for consent to marry a specified person. The judge may grant the application if he is of the opinion that refusal of such consent will be contrary to the woman's interests.

It is submitted that these provisions, relating to women who are of age, are out-dated. There would appear to be no valid reason for maintaining provincial differences. It is, thus, suggested that Section 2 of the Bantu Laws Amendment Act, 1972, relating to women in Natal and the Transvaal, be repealed.

MARRIAGE BY CUSTOMARY UNION

PROPOSITION: That regulations be issued under Section 22 bis of the Bantu Administration Act providing for *the compulsory registration of all customary unions.*

Customary unions can be registered, although such registration is not compulsory.

Section 22 *bis* of the Bantu Administration Act, inserted by Act 46 of 1962, empowered the State President to make regulations providing for the registration of customary unions and their annulment or dissolution, and for the appointment of official witnesses to officiate at ceremonies. Such regulations, providing for voluntary registration of customary unions in African homelands outside Natal, were issued as Government Notice R1970 of 25 October 1968. The Transkeian Government passed its own law dealing with this matter, as Act 3 of 1971 (power to enable it to do so having been granted by the Republican Government in terms of the Third Bantu Laws Amendment Act, No. 49 of 1970).

The Minister of Bantu Administration and Development in 1962 said (Assembly Hansard of 5 March 1962, col. 2039) that the Government was acting with great circumspection, but hoped that it would eventually be possible to make compulsory the registration of all customary unions.

In terms of the Natal Code (Chapter 8) a customary union is a civil contract. Polygynous unions are recognised.

The essentials are:

(a) the consent of the father or guardian of the intended wife (if she has not been emancipated), which consent may not be withheld unreasonably;

(b) the consent of the father or kraal head of the intended husband if the latter is under 21 years of age;

(c) a declaration in public by the intended wife to the official witness at the celebration of the union that this union is with her own free will and consent.

A woman who has been emancipated and granted the status of a kraal head does not need her father's or guardian's consent. In other cases, if consent is withheld unreasonably, a complaint may be made to the Bantu Affairs Commissioner, who will investigate the matter and, if he is satisfied, authorise the union to proceed and make an order regarding the payment of lobolo.

When a customary union has been arranged, the date fixed for its celebration must be reported to the chief or head-

man, who will direct an official witness to attend. Before the ceremony takes place the intended husband must pay fees of 75 cents to the chief and 50 cents to the official witness.

If, at the ceremony, the woman appears to be unwilling to proceed with the union, the official witness must prohibit any further proceedings, if necessary take the woman under his protection, and report the matter to the Bantu Affairs Commissioner.

At the ceremony the bridegroom or his father or kraal head must publicly announce to the witness what arrangements have been made in regard to the payment of lobolo. (The maximum amounts payable are laid down in Chapter 10.)

A register of customary unions is kept in the office of the Bantu Affairs Commissioner. Within one month after the celebration of a union the official witness must report particulars to the Bantu Affairs Commissioner in order that entries may be made in the register. The partners of the union and their fathers or guardians may attend too, but this is not compulsory. After the union has been registered certificates of the union are furnished, free of charge, to each of the partners.

No penalties are prescribed for non-compliance with this procedure, and the validity of the union is not affected by non-registration.

It is suggested that the registration of customary unions should be made compulsory throughout the country, and that certain amendments be made to the Natal Code, rendering it unnecessary for a woman to obtain the consent of her father or guardian if she is 21 years of age or over. In order to simplify matters for Africans in towns in might be advisable to provide that Bantu Affairs Commissioners, as well as chiefs, may appoint official witnesses.

THE POSITION OF WOMEN WHOSE HUSBANDS HAVE CONTRACTED MARRIAGE BOTH BY CUSTOMARY UNION AND UNDER THE COMMON LAW

PROPOSITION: That it be rendered illegal to enter into a common law marriage contract while a previous customary union remains undissolved, and vice versa.

In section 35 of the Bantu Administration Act a distinction is made between a marriage and a customary union. A marriage is defined as a union of one man with one woman, in accordance with any relevant law. It is stated that a

marriage does not include a customary union. The latter is defined as the association of a man and a woman in a conjugal relationship according to native law and custom, where neither the man nor the woman is party to a subsisting marriage.

It will be noted that the Act does not state that, in a marriage, neither the man nor the woman must be party to a subsisting customary union.

Section 22 of the Act provides that if a man wishes to marry during the subsistence of a customary union between him and anyone other than his intended wife, he must first declare upon oath before the Bantu Affairs Commissioner or magistrate of the district where he is domiciled the name of every wife he has by customary union, the names of all children of such unions, and the nature and amount of the movable property (if any) that he has alloted to each wife or 'house'. An official record of this declaration will be kept.

Community of property and of profit and loss cannot result from a marriage if the man already has a wife by customary union. Such a marriage shall in no way affect the material rights of the customary union wife and her children by this union. If the man dies, his widow by the common law marriage will have no greater rights in respect of his estate than she would have had if the marriage had been a customary union.

If, during the subsistence of a civil marriage, the husband contracts a customary union with another woman, the latter is invalid. In Natal (in terms of Section 13 of Law 46 of 1887), it is bigamous. Elsewhere, it is regarded merely as an illicit cohabitation. The man's legal wife may divorce him on the ground of adultery, with forfeiture of his lobolo rights. Children born of the illegal union are illegitimate and belong to their mother's father or guardian.

In the reverse case, when a man who is party to a customary union subsequently contracts a civil marriage, the customary union is, in effect, dissolved. The Transkeian Territories Native Appeal Court has held that the man forfeits all rights in the lobolo he paid for the customary union wife, and she is free to remarry.

It will be noted that, although the man is required to declare what amount of his movable property he has allotted to the wife by customary union, he is not obliged to allot any of his property to her. The movable property of their joint household remains vested in him, and he may dispose of it to the extent allowed by tribal law (this matter is dealt with later). He retains guardianship of the children and their custody except in cases where they are allowed to remain with their mothers during their early years.

The discarded wife may use the property allotted to her house only as long as she submits to her ex-husband's authority and lives at a place that he nominates.

Some protection for such wives is given in terms of pre-Union Acts or Ordinances in the various provinces which empower Bantu Affairs Commissioners to make orders against husbands for the maintenance of deserted wives and children under 15 years of age (Cape Act 7 of 1895, Natal Act 10 of 1896, Transvaal Ordinance 44 of 1903, and Free State Ordinance 51 of 1903). These are still in force (Section 10 *bis* of Bantu Administration Act), and apply in the case of wives of customary unions as well as of marriages. The woman must, however, show that she and the children are without means of support. The father would not be liable if they were being properly cared for by the head of his kraal or by the mother's people. The Children's Act renders it an offence if a parent, while able to do so, knowingly fails to support his children. Further, a wife can claim maintenance for children under the common law, although the courts deny a customary union wife the right to claim maintenance for herself.

Officials tend, however, to hold that customary union wives who apply for protection for themselves under the deserted wives and children protection acts should look for support to their lobolo holders. Even if a maintenance order is granted it may be difficult to trace and take action against the husband.

The position of discarded customary union wives is, thus, insecure and humiliating.

In Rhodesia it is regarded as bigamy to enter into a common law marriage while a previous customary union remains undissolved, and vice versa. It would be greatly to the advantage of African women if the Bantu Administration Act were amended to introduce such a provision.

In order to enforce it, regulations would have to be made under Section 22 *bis* of this Act to provide for the formal dissolution of customary unions. At present there are such regulations only in Natal, in terms of Chapter 9 of the Natal Code of Bantu Law. Elsewhere, a certificate of annulment on dissolution of a customary union can be obtained if this union was officially registered. If it was not, the union is considered to be dissolved if a husband publicly repudiates his wife, or if the lobolo paid on behalf of the wife is returned. Any regulations made should prevent a husband from repudiating a customary union wife unilaterally and without showing cause.

CIVIL MARRIAGES: COMMUNITY OF PROPERTY AND MARITAL POWERS

PROPOSITION: That the Bantu Administration Act be amended to provide that all civil marriages shall be in community of property unless otherwise stipulated in an ante-nuptial contract.

Before marrying by Christian or civil rites, a couple may enter into an ante-nuptial contract that excludes the husband's marital powers and/or community of property and of profit and loss. If this is done, the wives are legally competent to manage their own affairs.

In the case of non-Africans, if there is no ante-nuptial contract the marriage is in community of property. With Africans, however, a marriage by Christian or civil rites does not involve community unless the couple enters into such a contract prior to the marriage. Section 22(6) of the Bantu Administration Act provides that (except in cases where the men already have customary union wives) intending spouses may at any time within one month of the marriage declare jointly before a magistrate, Bantu Affairs Commissioner, or marriage officer that they wish community of property and of profit and loss to result from their marriage. Any land held under quitrent title is excluded from such community.

If such a declaration is not made, the position of the wife has been disputed. In 1946, however, both the Appellate Division and the Transkeian Territories Native Appeal Court ruled that the common law governs the proprietary rights of Africans whose marriage is out of community. The consequences are the same as those of a marriage with an ante-nuptial contract that excludes community but retains the marital power. The wife is the owner of her property and the husband retains his property, but he administers both estates by reasons of his marital power.

It is debatable whether African women are better off with or without declarations in regard to community of property.

A woman who has little opportunity of acquiring property of her own would find it advantageous for community of property to apply. She is then entitled to at least a half-share of the joint estate if her husband dies or if they are divorced (unless she is the guilty party in a divorce, when she is entitled only to the property she contributed if this is less than a half-share). In terms of the Succession Act of 1934 as amended, if her husband dies without leaving a will she receives a child's share in his estate or R10 000 (including her half-share), whichever is the greater. Since the value of African estates seldom exceed R10 000 the wife usually inherits the whole of the estate on intestacy.

If the marriage was out of community, however, the wife loses the security described above without receiving the compensating advantage of escaping from her husband's authority over her actions and possessions, except in so far as the Matrimonial Affairs Act of 1953 otherwise provides: this matter is dealt with below. In other respects she is a minor under his guardianship, and has no claim on her husband's estate. The husband can bequeath his entire estate to a third person (except for any land held under quitrent title or 'house' property). This person, inheriting under the common law, has no statutory duty to support the widow.

If he dies intestate his estate is distributed according to tribal law. She would then have the same right as the widow of a tribal marriage to be maintained out of his estate, but in practice may be in a worse position. Since a civil marriage does not establish a 'house', no property is earmarked for her benefit and that of her children. 'House' property is derived from a wider source than the woman's earnings and the goods she brought into the marriage. The house is a distinct unit within the complex of a joint family. In section 38 of the Bantu Administration Act it is defined as being the family and property, rights and status, which commence with, attach to, and arise out of the customary union of each Bantu woman. Chapter 11 of the Natal Code describes how junior houses may become affiliated to senior ones, but this does not affect the property rights of either. When a girl enters into a customary union her father may give her goods or cattle, and these become the property of her house. Lobolo paid for daughters, the fields and livestock allocated by the kraal head for the family's use, and earnings contributed by minor inmates become part of the house property. Section 23 (1) and (3) of the Bantu Administration Act make it clear that house property cannot be devised by will.

The Matrimonial Affairs Act, No. 37 of 1953, applies to all spouses, whether married in or out of community, and whether or not the marital power is excluded. Briefly, it provides that no husband may, without his wife's written consent, alienate or confer any real right in immovable property which belongs to his wife or which she brought into the community. Nor may any husband, without the wife's written consent, receive or take possession of any remuneration or dividends due to her, or of compensation awarded to her in respect of personal injuries she has sustained, or of any deposit standing in her name in a financial institution, or other amounts due to her personally from any other source. Any married woman may without assistance become a depositor in a savings institution. Should her husband desert her, she may obtain an order of court declaring any property subsequently acquired by her to be free of her husband's control.

This Act is of assistance to those African women who, being subject to the marital power, have property, receive wages or salaries, or derive an income from a trade or profession.

It would seem clear that a large majority of African women

would benefit if all marriages under the common law were in community of property unless otherwise stipulated in an ante-nuptial contract: if, in fact, Section 22(b) of the Bantu Administration Act were repealed.

CAPACITY OF CUSTOMARY UNION WIVES

PROPOSITIONS:

1. That it be made clear that the Matrimonial Affairs Act of 1953 applies to the wives of customary unions as well as to wives of civil marriages;
2. That the Bantu Administration Act be amended to provide that customary unions establish a partnership between husband and wife, with community of property, gains and losses;
3. That regulations be made under Section 22 bis of the Bantu Administration Act to enable a deserted customary union wife to divorce her husband without assistance from her guardian or a curator ad litem, and thereafter to possess full legal capacity;
4. That Chapter 9 of the Natal Code of Bantu Law be amended accordingly.

The law regulating the capacity of customary union wives is less clear than that in respect of wives under the common law, particularly as the Matrimonial Affairs Act does not state specifically that a wife in a customary union is in the same position as a wife in a marriage.

Section 11(3)(b) of the Bantu Administration Act provides that a Bantu woman who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian.

She has, thus, the right to be maintained by her husband while she lives with him or at another place with his approval. She may apply to the courts for protection if he wrongly dissipates the property of her house, and if he has deserted her without good cause she is entitled to an order placing the house property under her care for the support of her family. She would gain no real right in this property. On the other hand, if she deserts her husband without good cause she cannot take his property with her and she loses her claim to maintenance.

If the woman herself earned money or acquired moveable property, the husband might demand possession of these. In

such a case, with the aid of a curator or the court's permission to act on her behalf she might sue her husband. The court might hold that the Matrimonial Affairs Act applied, and that the husband had acted illegally. But Section 11(1) of the Bantu Administration Act authorised Bantu Affairs Commissioner's courts, in their discretion, to apply native law in proceedings between Bantu which involve questions of customs followed by them, provided that such native law is not opposed to the principles of public policy or natural justice. If a dispute about the earnings of a customary union wife were referred to a Bantu Affairs Commissioner he might decide the matter according to native law and custom and that, as the woman was a minor, her earnings were the property of her house and came under the husband's control.

It might be worth considering amending the Bantu Administration Act to provide that customary unions establish a partnership between husband and wife, with community of property, so that house property becomes the property in the joint estate.

As mentioned above, Section 11(3)(b) of the Act states that customary union wives who are living with their husbands are deemed to be minors. It is not clear what the position is if they are living apart from their husbands. On the face of it, such a woman is not a minor. But the courts have held otherwise, even in cases where the woman's husband has deserted her and her customary union has been dissolved *de facto*.

Judgments of the Transkeian Appeal Court in 1974 and 1975 held that a deserted wife can sue or be sued [illegible]. It might be argued, then, that she is a minor only when the right or obligation in question is governed by native law, but that in matters dealt with under the common law she has full legal capacity. Alternatively, native law might be applied, in which case any property which she acquires belongs to the house and comes under her husband's control if he returns and asserts his rights. The whole matter needs clarification.

A solution might be for regulations to be issued under the Bantu Administration Act enabling a customary wife who had been deserted to sue for divorce on her own account, and, if a divorce is granted, to achieve full legal capacity Chapter 9 of the Natal Code would then have to be amended

[illegible]

INHERITANCE OF PROPERTY

PROPOSITION: That the common law should be applied to all estates, with suitable modifications in the case of polygynous households

All African men, and also women who are legally considered to be majors, are entitled to make wills bequeathing their property to whomever they wish; except that a man cannot thus dispose of any land he holds under quitrent title or of moveable property which he has allotted to a customary union wife or her house, or which accrues to such a woman or house under native law and custom. (Section 23 of the Bantu Administration Act.)

If a valid will is left, this is administered by the Master of the Supreme Court in the usual manner, in terms of the Administration of Estates Act, No. 24 of 1913.

When an African dies intestate his (or her) estate is administered under the common law if the deceased held a letter of exemption from native law, or if at the time of death he or she was partner to a marriage in community of property, or if he or she was a widower, widow, or divorcee of such a marriage and is not survived by a partner to a customary union entered into after the dissolution of the marriage (G.N. 939 of 1967, Regulation 2).

When the common law applies, the property of a widower, widow, or divorcee who died intestate is divided equally between the daughters and sons. If the deceased was at the time of death married in community, the surviving spouse inherits a part or the whole of his estate according to its value, under the Succession Act of 1934 (unless, as described earlier, a man has a surviving customary union wife as well as a widow by a common law marriage).

In detail, however, even if a woman inherits under the common law she cannot (unless she has been emancipated) become the full owner of the inheritance: it is controlled by her guardian.

In the absence of a valid will an estate devolves under native law if the deceased was unmarried, or is survived by the partner or issue of a marriage that was not in community of property, or a customary union or putative marriage. (G.N. 939 of 1967.)

A man's estate then usually passes to a male heir to the exclusion of female relatives. If, however, a man is survived by a widow of a civil marriage or a customary union, or by a putative widow, she can appeal for relief under the common law; and the Minister has a discretionary power to direct that some or all of the assets (other than land held under quitrent title or house property) shall devolve under the common law. In effect, he can decide whether the pro-

perty is to go to the male heir under tribal law or to the widow under the common law. The machinery provided for granting relief to widows is, thus, flexible, which is probably essential in a changing society; but it is also cumbersome.

If the common law is not applied, the rule of male primogeniture operates, with certain variations amongst different tribes. In general, a father's property passes to his eldest son or to the latter's eldest male descendant. A younger son inherits only if his elder brother predeceased him and did not produce an heir. If there are no sons the estate passes to the father's eldest brother or to this brother's eldest son. An estate may thus, devolve on a son, brother, or nephew, but never on the man's widow or daughter - in spite of changing conditions. Joint families, which afforded security to women and children, are now rare in urban communities and are seldom self-sufficient in rural areas, depending largely upon money remitted by migrant workers, both women and men. Many women have to support themselves and their children by their own efforts.

The traditional law often operates harshly on the widow of a civil marriage out of community, since her husband's estate may pass to a fairly remote relation of his. Unless she joins this man's homestead she has no claim to maintenance out of the estate.

Male traditionalists object to the consequences of a marriage in community, one of their main reasons being that if a widow remarries the second husband gets the benefit of the deceased's property. Men can prevent this by making a will, but few do so.

Women tend to acquiesce. They, too, inherit traditional attitudes; but there are other reasons. In many instances, when the customary method of administering an estate is employed, the widow is left in control when the heir is a minor or cannot be traced or does not wish to act.

Traditional attitudes, are, however, continually changing, and such changes would undoubtedly be reflected in native law if this were not institutionalised. It is important that the laws of the country and court practice should be revised where developing conditions make this advisable.

It would probably be to the benefit of women, and certainly to that of younger sons, daughters, and illegitimate children if the common law were applied to all estates, with suitable modifications in the case of polygynous households.

GUARDIANSHIP AND CUSTODY OF MINOR CHILDREN

PROPOSITIONS:

1. That it be provided in the Bantu Administration Act that, notwithstanding any custom to the contrary, Bantu divorce courts shall award the guardianship and custody of a minor child in accordance with the child's best interests, but without prejudice to rights to lobolo.

2. That a similar provision be contained in any regulations made for the registration and dissolution of customary unions.

3. That it be provided in the Bantu Administration Act that the mother has the guardianship and custody of a child born out of wedlock, and the right to receive lobolo for daughters, unless she voluntarily agrees that these rights be ceded to the natural father; and that a child who remains with his mother should be entitled to inherit her property.

CHILDREN OF WIDOWS

Under the common law, a widow who married according to civil rites is the guardian of her minor children and is entitled to their custody. In terms of native law 'property' rights in them are inherited by the father's heir: he would receive the lobolo paid for daughters. If a woman does not assert her rights under the common law, however, her deceased husband's heir may claim the guardianship and custody.

CHILDREN OF PARENTS MARRIED BY CIVIL RITES WHO ARE DIVORCED OR SEPARATED

Section 5 of the Matrimonial Affairs Act of 1953 provides that when making an order for divorce or judicial separation, the Supreme Court may grant either parent the sole guardianship or sole custody of any minor children if it is proved that it would be in the interests of the children to do so. Alternatively, custody may be awarded to the mother while the father continues to be their guardian.

These provisions apply when Africans who have been married under the common law are divorced or judicially separated in a Supreme Court action; but most Africans prefer, instead, to take such cases to the special native divorce courts (established in terms of Section 10 of Act 9 of 1929 as amended) since the costs are lower there.

The award of the custody of minor girls is complicated amongst Africans by the question of the property rights in the children, and for this reason a father may challenge a decision to award the custody of a girl to the mother, particularly if native law is applied in a native divorce court, in order to make it clear that he will be entitled in due course to claim the lobolo, or to transfer the right to receive this lobolo to someone else as security for a debt. The principle that the child's interests should be paramount may, thus, become clouded.

It would be to the children's benefit if the law specifically provided that, notwithstanding any native custom to the contrary, the guardianship and custody of a minor African child shall be awarded by the courts in accordance with the child's best interests, but without prejudice to rights to lobolo under native law.

CHILDREN OF CUSTOMARY UNIONS THAT ARE DISSOLVED

Upon the dissolution of a customary union the children are regarded as belonging to the father, who retains the guardianship. He forfeits these rights only if the full lobolo paid for his wife is returned to him. In that event, if the mother is officially a minor, the children belong to her guardian. If lobolo has not been paid in full, the wife's guardian may take custody of the children pending settlement of the debt.

Section 82 of the Natal Code empowers the courts hearing an action for divorce to make such an order relating to the children's custody and maintenance as may be just and expedient. In the other provinces tribal divorces are the private affairs of the parties, and the court faces the question of custody only upon application.

In practice, when native law or the Natal Code is applied the mother is likely to obtain the custody only if she can prove that her husband is unfit to take charge or has persistently failed to support the children, or if they are very young. In the latter case the court may specify an age at which the children must be surrendered to their father.

If the matter does not go before a court, however, it is a common practice for the children to grow up at the home of their mother's family.

If regulations should be made for the country as a whole governing the formal dissolution of customary unions, as has been suggested earlier, it might be desirable to provide that in these cases, too, both the guardianship and the custody of minor children should be decided by the court according to their best interests, again without prejudice to rights to lobolo.

CHILDREN OF UNMARRIED MOTHERS

Under the common law the mother of an illegitimate child has both guardianship and custody. Tribal law as applied in the courts varies: in the northern provinces the child is held to belong to its mother's group; but among the Cape Nguni the natural father may claim the child if he pays full damages for seduction and, if appropriate, the maintenance fee (usually one head of cattle) due to the wife's group for having looked after the child for a period. This provides certain advantages for a son, since according to the Cape Nguni tribal law an illegitimate son who remains with his mother's family cannot inherit her estate, but if his father takes lawful custody of him he ranks as the youngest son and can inherit in the absence of a legitimate male descendent of his father.

The question of claims to lobolo again gives rise to disputes over custody.

It might be advantageous if the Bantu Administration Act laid down clearly that the mother has guardianship and custody of a child born out of wedlock, and the right to receive lobolo for daughters, unless she voluntarily agrees that these rights should be ceded to the father; and that a child who remains with his mother should be entitled to inherit her property.

The common law makes both parents liable for the maintenance of children born out of wedlock.

COMPETENCY OF WITNESSES IN CRIMINAL PROCEEDINGS

PROPOSITION: That the partners to a customary union should be placed in the same position as are the partners to a marriage in regard to liability for giving evidence for the prosecution in criminal proceedings.

Section 226 of the Criminal Procedure Act, No. 56 of 1955, provides that except in certain defined types of cases the wife or husband of an accused shall not be compelled to give evidence for the prosecution.

But sub-Section (3) states, 'anything to the contrary notwithstanding in this Act or in any other law, every person married in accordance with native law or custom shall, notwithstanding the registration or other recognition under any law of such a union as a valid and binding marriage, for the purposes of the law of evidence in criminal cases, be in the same position as an unmarried person'.

The Women's Legal Disabilities Commission recommended that there should be no discrimination in this way (U.G. 18/1949 paras. 234 - 5). The wife or husband of an accused who is compelled to give evidence is under severe temptation to commit perjury. If he or she does not do so, the couple's married life may become embittered or disrupted.

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